Saturday, May 12, 2001

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

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In re

MARC and DENISE THORPE, No. 98-11963

Debtor(s).

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MARC THORPE,

Plaintiff(s),

v. A.P. No. 01-1061

ROBOT WARS, LLC, et al.,

Defendant(s).

_____/

Memorandum re Preliminary Injunction

Steven Plotnicki is the owner of Profile Records, Inc., which owns defendant Robot Wars, LLC. On behalf of Profile, Plotnicki has filed several claims in the Chapter 11 proceedings of debtors Marc and Denise Thorpe. These claims are central to the Thorpes' efforts to reorganize. As part of the plan confirmation process, the court both estimated the amount of Profile's claims and adjudicated the rights of Profile and the Thorpes relating to an agreement they reached while the Chapter 11 proceedings were pending. The court's decision is now on appeal in the district court, as well as confirmation of the Thorpes' plan. Although the dispute was always a two-party affair between Plotnicki and Thorpe, there were technically three parties to the agreement which was the subject of the litigation now on appeal: Marc Thorpe, Profile, and Robot Wars LLC. The only reason Robot Wars was made a separate party was that it was to be responsible for the payment of certain royalties to Thorpe. Incredibly, Robot Wars has filed an action in federal district court in New York seeking both an administrative priority claim in the bankruptcy proceedings and damages against Thorpe personally on *exactly the same issues decided by this court and now being appealed by Profile.* Plotnicki is attempting to use the separate identities of Profile and Robot Wars to appeal decisions of this court on one coast while re-litigating the same issues on the other coast. There are so many procedural flaws in this action that the court hardly knows where to begin. The only justification Robot Wars and its counsel have given for their actions is 28 U.S.C. § 1409(e), which specifies proper *venue* for a proceeding against the representative of a bankruptcy estate based on a claim arising after the commencement of a case from the operation of a business. Robot Wars seems to mistakenly think that this section is an *enabling* statute, which it is not. The enabling statute is 28 U.S.C. § 959(a), which permits debtors in possession to be sued without leave of the court appointing them with respect to any of their acts or transactions in carrying on business connected with estate property. The statute provides:

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

There are several problems associated with Robot Wars' reliance on § 959(a). First of all, it is doubtful that its claims arise out of the carrying on of business as contemplated by that statute, which was intended to permit tort actions arising out of the debtor's business, not contract disputes at the core of reorganization proceedings. In re Balboa Improvements, Ltd., 99 B.R. 966, 970 (9th Cir. BAP 1989). Secondly, it affords Robot Wars no justification whatsoever for attempting to recover a personal judgment against Thorpe. Thirdly, § 959(a) gives this court, as the appointing court, the power to enjoin an action even if it is proper under that statute if the court finds the action threatens the administration of the bankruptcy estate. Diners Club, Inc. v. Bumb, 421 F.2d 396, 398 (9th Cir. 1970)("[T]he first sentence's broad grant of permission to sue is limited by the second, which makes suits subject to the general equity power of the appointing court."). Thus, Robot Wars and its counsel have exposed themselves to significant liability in bringing an action which is highly questionable and subject to injunction by this court even if proper. In addition, Robot Wars is not immune from these bankruptcy proceedings just because it has never filed a proof of claim. Having full knowledge of the bankruptcy at all times, it is bound by the confirmed plan in this case, which if upheld on appeal will have *res judicata* effect precluding any dispute which

was raised or could have been raised prior to confirmation. 11 U.S.C § 1141(d)(1)(A)(i); In re Heritage Hotel Partnership I, 160 B.R. 374, 377 (9th Cir.BAP 1993). Lastly, the court notes that regardless of its form the district court action brought by Robot Wars is in substance a collateral attack on this court's judgment in the adversary proceeding involving Profile and this court's order confirming the Thorpe plan. The proper way to contest these rulings is by appeal to the district court for this district. An independent action in the district court of another district, attempting an "end run" around the rulings of a bankruptcy court, is not proper. Celotex Corp. v. Edwards, 514 U.S. 300 (1995). Not only would prosecution of the New York action clearly interfere with the administration of the bankruptcy estate here, but it appears that the action was *calculated* to interfere. Pursuant to 28 U.S.C. § 959(a), it must be enjoined. For the above reasons, the court will exercise its power under 28 U.S.C § 959(a) to enjoin the district court litigation. Counsel for the Thorpes shall submit an appropriate form of preliminary injunction.

Dated: May 12, 2001

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Alan Jaroslovsky

U.S. Bankruptcy Judge
